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Drifting Down the Webcasting Stream: Can Businesses Stay Afloat?

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The MEIEA Journal *occasionally features outstanding student papers. This undergraduate research paper was written by Kelsey Bartlett, a senior at Missouri State University.*

Introduction

The static of an AM/FM radio is not as familiar as it once was. With technological advances and widespread use of the internet, radio transmission has assumed a whole new form. Streaming radio, often referred to as webcasting, is a recently developed mechanism that broadcasts audio transmissions via the internet. Distinct from terrestrial radio operations, webcasting provides a "stream" of continuous audio programming to any compatible device. While this innovative service is usually offered at little or no cost to listeners, internet stations are facing steep royalty fees that threaten their futures. Several commercial and radio webcasters are in dispute with record labels, and the entities representing the labels, for using the labels' licensed materials. Artists, record labels, and the collective industry demand to be paid what many consider to be high royalty rates for the use of the music; the webcasting stations argue for paying lower royalty rates. After more than ten years and countless legislative efforts to settle the dispute, a few major players in the webcasting realm remain in clash with the industry. As webcasting business' revenues are scrutinized, the controversy over a payment plan for streaming music will persist as ideas are converted into workable solutions.

Operation

Webcasting stations operate in two broad fashions, as commercial or noncommercial. Commercial webcasting stations, such as Pandora, are generally large entities that run their stations as for-profit businesses. Noncommercial webcasters, such as hobbyists or collegiate stations, broadcast for other reasons and usually do not generate profits. This paper will refer

mostly to commercial internet radio stations.

Revenue

According to 2007 Bridge Ratings, 57 million people listen to internet radio every week. In the same study, internet radio saw the greatest increase in "Intent to Listen."[1] Perhaps advertisers notice this trend, as webcasters derive a significant portion of revenue from sales of web site advertising spots. For streaming web sites that provide radio services at no charge, this reliance on advertising is especially important; advertising sales are the web site's main source of income. Pandora, a free internet radio service, receives income from national advertisers such as HP, Microsoft, Honda, Procter & Gamble, and Nike.[2] In addition, a recent breakthrough now allows radio stations to generate revenue through insertion of "live reads" into online and mobile streams of internet radio broadcasts, allowing ads to "feel natural and unobtrusive."[3]

Outside of advertising revenue, some streaming stations generate income through monthly membership plans. Few internet radio stations obtain income from the sale of the music itself; per-track fees are rare in the webcasting world. Internet radio stations often charge increased membership rates for greater accessibility. For example, Live365 internet radio service offers "VIP" packages of US$5.95, $6.95, and $7.95 per month for "ultimate access." This access provides listeners with uninterrupted radio, free of commercials, banner ads, and pop-ups.[4]

Expenses

This revenue does not come without costs. To operate an internet radio station, costs vary depending on the station's size. A webcaster must pay server and bandwidth fees, which have the potential to add up to tens of thousands of dollars per year.[5] A station must also pay electricity charges, CD costs, equipment, DJ and payroll wages, and promotional expenditures.[6] To add further to the webcasting tab, copyright license fees called "royalties" must now be paid to the labels or their representing entities for material that a revenue-generating internet station plays. In Live365's VIP section the company explains, "Live365 pays royalties to artists and songwriters for the songs you hear" (Live365). These fees were not always required, however. Prior to 1998, similar to their terrestrial station counterparts, internet radio stations were not yet required to pay statutory fees for playing music on their broadcasts.[7] When such stations gained

popularity and labels recognized the untapped revenue source, they called for payment for the music.

Legislative Struggle

With webcasting technology growing rapidly, the labels and their representing entities petitioned Congress for updated laws regarding copyright royalties. As copyright issues were left unsettled, the Recording Industry Association of America (RIAA), representing more than six thousand labels and their artists, lobbied Congress to pass legislation requiring the online stations to pay for any music played.[8]

Digital Millennium Copyright Act of 1998

Pressured by the RIAA, Congress passed the Digital Millennium Copyright Act of 1998 (DMCA). To clarify how copyright laws apply to streaming internet radio, the DMCA revokes webcasters' fee immunities and creates an efficient "statutory license" to cover eligible non-subscription broadcasts.[9] This license permits a webcaster to play all sound recordings without obtaining separate licenses from individual copyright owners.[10] After the act passed, webcasters were not satisfied with the assigned rates, claiming the fees consumed an unfair portion of their revenue. Meanwhile, the RIAA stood firm supporting the rates of the DMCA. This initial quarreling set the stage for a long-lasting standoff between the RIAA and webcasters. Disagreements regarding royalty rates and conditions have endured and even escalated since. While the Act attempted to solve the uproar about internet radio performance royalties, it only created more conflict.

Intercompany Negotiations

The U.S. Copyright Office then permitted the RIAA and webcasters to negotiate royalty rates between one another. RIAA offered the webcasters a rate of $0.004 for each song streamed per listener. This proposal did not satisfy the webcasters. Digital Media Association (DiMA), a trade association representing "[businesses that] depend on the distribution and streaming of digital entertainment content,"[11] like Pandora, Yahoo!, Viacom, and RealNetworks, presented a counter-offer to pay $0.0015 for each listener per hour.[12] To illustrate the magnitude of the differing offers, Kellen Myers of Indiana University's Maurer School of Law uses this hypothetical example:

> To start, imagine one hour of music, which equates to roughly ten songs. Under the DiMA plan, that amount of airplay would cost a webcaster $0.0015 *per listener*. Under the RIAA's plan, each *song* would cost $0.004, which would total $0.04 per listener hour for the same number of songs. To continue this illustration, imagine a webcast reaches 10,000 listeners per hour. Now, the DiMA plan equates to $15 *per hour*, while the RIAA plan equals $400 *per hour*. In a study conducted of a successful radio station, research data provided numbers tending to show that under the DiMA proposal, a station would pay roughly $192,000 per year. If the RIAA plan were to be adopted, however, the same station would have to pay over $5.5 million (Myers).

Given that the offers on the table were considerably different, the RIAA and DiMA were still unable to reach an accord.

Copyright Arbitration Royalty Panel

When the two parties could not reach an agreement, the U.S. Copyright Office convened a Copyright Arbitration Royalty Panel (CARP) to arbitrate and resolve final issues between the RIAA and DiMA regarding terms, but had no preexisting internet radio market standard on which to base the rates. For internet-only streams, CARP instituted a rate of $0.0014 per performance along with a rate of $0.0007 per performance for online retransmission of terrestrial radio broadcasts.[13]

The stalemate continued as both sides appealed the decision of CARP. The RIAA insisted that the rates were too low, while DiMA's webcasters argued that the rates were high enough to be a "magnitude above [their] total revenue."[14] The Librarian of Congress was called to intervene, amending the rates to $0.0007 per song for both internet-only and terrestrial retransmissions. Webcasters continued objections, maintaining the rates set by the government officials were unrealistic and would not allow their businesses to remain profitable.

Small Webcasters Settlement Act

The sustained discrepancy then led to the introduction of the Small Webcaster Settlement Act (SWSA). The act, though amended, was unani-

mously approved by both houses of Congress in late 2002. It established SoundExchange, a nonprofit division of the RIAA, as the music industry's "receiving agent" to collect royalty payments made by eligible webcasters.[15] Although the Act provided improved terms over all previous rates, webcasters did not see the solution as evenhanded. From their perspective, they persevered, fought legislation, and struggled to keep their businesses afloat.

Copyright Royalty Board

In response to the persisting discord, Congress created the permanent Copyright Royalty Board (CRB) to intervene and set royalty rates. After a two-year trial, hearing testimony from both sides of the DiMA-SoundExchange royalty rate impasse, the CRB set retroactive terms for the years 2006 through 2010. Table 1 lists these rates.

Year	2006	2007	2008	2009	2010
Rate	$0.0008	$0.0011	$0.0014	$0.0018	$0.0019

Table 1. Commercial webcasters, per performance rate. (Myers)

Small-scale webcasters could avoid these rates by having fewer than 159,140 aggregate tuning hours per month. Under this threshold, they were ordered to pay a minimum annual fee of $500 per station.[16] But if small webcasters exceeded the aggregate tuning hour limit, they had to pay the same royalty rates that apply to much larger commercial webcasters, as shown above. Claiming that this new decision "discourages [small stations] from growing," among other matters, the webcasters refused to accept these terms (C. Miller).

Webcaster Settlement Act of 2008

The most recent piece of webcasting legislation arose in 2008, when DiMA and the RIAA jointly urged Congress to grant them both more time to negotiate. To accomplish this, the two parties—much to the public's surprise—cooperated and produced the Webcaster Settlement Act of 2008 (WSA). Days before Congress passed the bill, the DiMA-represented station *Pandora* spoke out. Tim Westergren, founder of Pandora Radio, explained his hopefulness about the act in an interview with a reporter for

CNET News. Explaining the "critical bill," Westergren said:

> [The WSA] is essentially an extension…[WSA] allows us to extend a negotiation that has been going on about a year now. Webcasters such as *Pandora*, *YahooLAUNCHCAST*, *AOL*, and others have been negotiating with rights-holders. We've actually made significant progress in the last few months, and we're pretty optimistic about getting a resolution, but we needed more time. This bill gives us the time to do that.[17]

After the Act was approved by both houses of Congress, President Bush signed it on October 16, 2008.

The WSA authorized SoundExchange to represent all copyright owners and performers in agreements with webcasters regarding rates, terms, and conditions. Under the WSA, the Corporation for Public Broadcasting, National Public Radio, and some small webcasters came to royalty-reducing agreements.[18] Not appearing on the list of agreements, however, was DiMA or its represented companies. The authority granted by the WSA to enter into settlement agreements expired on February 15, 2009, with DiMA "failing to reach a deal."[19] DiMA's Executive Director, Jonathan Potter, supports the rejection. He says, "Many points were agreed upon"[20] but the DiMA companies "voted against accepting the agreement…because of substantive issues."[21]

DiMA vs. The Industry

DiMA and the companies it represents now find themselves in a difficult situation. Potter justifies turning down the settlements because SoundExchange and DiMA still had critical differences. He implies that the two organizations came close to an agreement that would have set a station's royalty payment based upon a percentage of revenue. The trouble with this arrangement, though, was determining that percentage, and on what base that percentage should be calculated. Companies under DiMA assert that they conduct various activities that might not have to do with the performance of a sound recording (Hefflinger). In negotiations, the parties have deliberated whether DiMA's multifaceted companies should pay royalties based on all of their operations or only revenue from divisions that relate to webcast music. "Where do you draw the gray line?" asks Potter.[22] By

refusing agreements, DiMA's companies could be inadvertently putting themselves in jeopardy by obligating themselves to pay the high royalty rates set by the CRB.

Outlook

Unless DiMA and the music industry have a synchronized epiphany concerning a fair royalty rate, the obstinate parties will have to carry on their negotiations. In the course of these discussions, DiMA and other unsigned webcasters must continue to pay the CRB rates. The negotiations will likely involve the previously discussed revenue percentage rates, or perhaps per-play metrics. Worried webcasters could analyze new approaches as well such as a blanket license, a match of current satellite radio fees, and a "jukebox approach."

Blanket License Rate

In the United States, traditional AM/FM radio stations—and others wishing to make public performances of music—may pay annual fees called "blanket licenses" to the three major performance rights organizations, ASCAP, BMI, and SESAC. This license grants a user the right to perform publicly all the songs in the society's catalog.[23] Many restaurants, television networks, movie producers, and colleges use this type of license to obtain a broad range of rights to the music they perform.

Since webcasters merely "perform" music instead of making physical copies for distribution, a blanket license concept could apply. This annual fee could be charged to internet radio stations in lieu of per-use royalty fees or revenue percentage payments. The license would cover an immense amount of music; securing a blanket license from ASCAP alone would allow a webcaster access to "over 8.5 million songs in the ASCAP repertory as much or as little as [a webcaster] likes."[24]

Satellite Radio Fee Parity

Analogous to internet radio stations, satellite radio companies like Sirius|XM broadcast music and other programming to a global audience via satellite. Unlike internet radio stations, however, satellite radio stations currently pay a CRB-set performance license rate of six percent of gross revenue for music played.[25] In sharp contrast, the CRB has previously charged webcasters ten to twelve percent of their revenue in performance license rates. Since the technologies are similar, the CRB could

make amendments to give rate parity to satellite and internet radio. The common low rate could help both technologies achieve financial success, thus benefiting the music industry as a whole (Myers).

Jukebox Approach

Jukebox operators pay license fees and purchase their own physical copies of music. As a result, Congress has exempted them from performance royalties since 1909. Because artists are already reimbursed this fee for such jukebox performances, charging royalty rates could give rise to overcompensation (Myers).

Webcasting technology has been deemed by some as the world's newest "celestial jukebox."[26] If webcasting streams were exempt from the royalties in the same way jukeboxes are, internet stations could merely pay licensing fees to artists. Not only would this policy simplify the law that applies to internet radio, it would, "prevent the sort of double dipping that many believe the RIAA seeks" (Myers).

None of the Above

In a phone call on April 14, 2009, I spoke with an attorney who resides in Washington, D.C. and works closely with copyright issues. He wished to remain anonymous, but reported that as far as he was aware, DiMA "has not signed onto any agreement." He also disclosed, "Even if [DiMA] came to a deal today, they wouldn't be able to take advantage of it without a new Act of Congress to bless the settlement."[27] Consequently, I foresee DiMA and the industry creating more legislation, perhaps titled the "Unable to Agree Act of 2009" (UTAA), to push for more time.

Conclusion

While the static of AM/FM radio is fading from memory, the static nature of the webcasting dispute is emerging as a highly discussed topic. The streams of internet radio are proving to be useful mechanisms to promote artists and their music, but often cost webcast operators significantly more than the associated revenue. For this reason, webcasters remain at odds with SoundExchange and the music industry. SoundExchange General Counsel Michael Huppe demonstrated the sum of the organization's sympathy for webcasters when he revealed, "We judge our success on how much money we can get out the door [to artists], and how quickly we can do it. The less money that goes out the door, the less pleased we are with

our process" (A. Miller).

Existing copyright law is based on two objectives—the promotion of ingenuity and the sharing of creativity.[28] To promote ingenuity, a mandated payment system is enforced to compensate copyright holders for their products. Webcasters maintain they follow this objective by agreeing to pay reasonable royalty rates for musical works they use. However, to achieve the second objective, the current royalty rate system warrants change. Webcasters should be allowed to use and share material fairly and for a reasonable price. America's laws and business agreements must adapt to balance these objectives.

Note:

After completion of this essay, huge steps were taken by SoundExchange and commercial webcasters to settle the persisting royalty conflict. On June 31, 2009, President Obama granted and signed an extension to the Webcasters Settlement Act, which had expired earlier the same year in February.[29] While no new piece of legislation entitled the "Unable to Agree Act of 2009" was created, the WSA extension gave the two parties more time to negotiate. About one week later, on July 7, SoundExchange announced that a three-tiered experimental rate agreement had been reached between the company and several webcasting companies.[30]

The three levels defined in the agreement include large-revenue commercial webcasters, such as Pandora, that earn more than US$1.25 million per year, small webcasters, earning $1.25 million or less, and those webcasters that provide bundled, syndicated, or subscription services. The large commercial webcasters have to pay a per-performance rate or 25% of gross revenue, whichever figure is higher, with a $25,000 per year minimum. The new per-performance rate, $0.00097 in 2010 (SoundExchange Blog), is comparatively lower than the rates previously set by the Copyright Royalty Board, $0.0019 in 2010 (Myers). Small webcasters have a similar structure, paying the greater of a percentage of total revenue or

total expenses. For subscription or syndicated services, the highest of payment structures, webcasters pay rates slightly lower than those set by the CRB.[31]

The agreement, covering royalty rates through 2014, outlines an experimental structure for the two parties, SoundExchange says, designed to provide an approach for the future (SoundExchange Blog). As a blueprint, the revised rates could lead to a solution for the webcasting business.

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